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BGMC Holdings Bhd (formerly known as BGMC Holdings Sdn Bhd) v Fulloop Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-291–06 OF2021
WAN MUHAMMAD AMIN JC
30 SEPTEMBER 2022

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Companies and Corporations — Scheme of arrangement — Application for — Sanction Stage — Company unable to pay debt — Court's convened creditors' meeting conducted — Issues to be considered by court at sanction stage pursuant to s 366 of Companies Act 2016 — Whether statutory requirements of s 366(1) and (3) of the Companies Act 2016 had been complied with — Whether requirement that 75% of total value of creditors or class of creditors or members orWhether the bona fide test had been satisfied class of members present and voting had been met — Whether the reasonableness test had been satisfied — Companies Act 2016 s 366(1) & (3)

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This was yet again a case whereby a company was forced to restructure its financial affairs due to the outbreak of COVID-19. The company in the present case was in the business of civil engineering and principally engaged in a wide range of construction services. Since the company could not pay its debt to the creditors but was still an active business enterprise with on-going construction projects which were revenue-generating, a member of the company ('the applicant') had filed the present originating summons ('the OS') to apply for sanction of court in respect of scheme of arrangement pursuant to s 366(3) of the Companies Act 2016 ('the CA'). Under the said scheme, the scheme creditors were categorised into two categories known as Category A and Category B. The method of settlement for both categories were the same whereby 20% of the scheme creditors' compromised sum would be paid in cash and the remaining 80% would be paid via conversion into redeemable secured loan stocks ('the RSLS') issued by the company. On 29 March 2021, an ex parte order ('the ex parte order') was granted by the court for the company to convene the creditors' meeting ('the CCM'). Subsequently, on 16 June 2021, the CCM was called, and the explanatory statement ('the ES') was deliberated and explained to all the scheme creditors. At the end of the process, majority of the scheme creditors had voted in support of the proposed scheme. In determining the present application for sanction, the court had considered the following issues: (a) whether the statutory requirements of s 366(1) and (3) of the CA had been complied with regards to the CCM in particular, the requirement that 75% of the total value of the creditors or class of creditors or members or class of members present and voting had been met ('the 75%

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threshold requirement'); (b) whether the class was fairly represented by those who attended the meeting and that the statutory majority were acting bona fide and were not coercing the minority in order to promote interests adverse to those of the class whom they purported to represent ('the bona fide test'); and (c) whether the scheme of arrangement was such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve ('the reasonableness test').

Held, allowing the OS with no order as to costs:

(1) There were three stages of the restructuring process under s 366 of the CA. The three stages were the application stage, the meeting stage, and the sanction stage. The present OS was in relation to the sanction stage. The court found that the OS at the application stage was still not completely concluded, as such, the application for sanction should be made via a notice of application under the application stage action/originating summons. If a fresh originating summons is filed at the sanction stage, the matter may be heard by a different judge and the applicant would often request for the matter to be heard by the same judge who granted the orders at the application stage as that judge would be familiar with the applicant's restructuring exercise (see paras 35 & 41–44).

(2) The court found that the applicant had complied with the terms of the ex parte order and the scheme was approved by 88.28% of the value of the scheme creditors. Therefore, the applicant had satisfied the statutory requirement of s 366(3) of the CA in obtaining minimum 75% in value scheme creditors and had in fact exceeded the said minimum requirement (see paras 47–49).

(3) The company's related companies were all unsecured creditors. In the case of liquidation, they were entitled to claim against the company, and they will rank pari passu with each other and the other unsecured creditors. Thus, the court agreed with the applicant that these companies ought to be classified in one single class with the remaining unsecured creditors. In the circumstances, the classification of the scheme creditors was proper because they were classified based on their 'rights against the company', not their 'interest'. Since the court had determined that the classification of the scheme creditors was proper, it did not stand to reason why the votes of the scheme creditors related to the company ought to be discounted or disregarded (see paras 67, 76 & 79).

(4) In respect of the respondents' allegation that the scheme was not fair and lacked bona fide as the ES provided to the scheme creditors contained misleading information, the court found that the respondents' complaints were not really because the information was misleading or insufficient. Rather, the respondents' criticism of the scheme was

something that came about after the CCM and was centred on challenging the scheme by searching for weaknesses in it after it was approved by majority of the scheme creditors. The court found no merits in the respondent's complain on this issue that the scheme was unfair and lacked bona fide (see paras 129–130).

(5) Despite the respondents' allegations that the bona fide test was not satisfied, they had not shown any evidence that the class was not fairly represented or that the majority was not acting bona fide or that the minority was being coerced to promote interests adverse to those of the class whom they purported to represent. In relation to the argument that the scheme was unreasonable, the court accepted the applicant's reasons and purpose of the scheme as stated in para 55 of the grounds of judgment. The court did not find the scheme to be unreasonable. The court therefore found that the bona fide and reasonableness tests had both been satisfied. The court was aware and cautious of the fact that the court should not embark on a detailed analysis of the merits of the scheme as against another and substitute the commercial judgment of the scheme creditors with the court's judgment. Based on the authorities such as the case of *Re Apcoa Parking Holdings GmbH and others* [2016] 1 All ER (Comm) 30, there was no reason for the court not to give effect to the decision of the majority of the scheme creditors that had met and exceeded the statutory 75% threshold requirement (see paras 85, 132, 134, 136 & 146).

[Bahasa Malaysia summary

Ini sekali lagi merupakan kes di mana sebuah syarikat terpaksa menstruktur semula hal ehwal kewangannya kerana wabak COVID-19. Syarikat dalam kes ini terlibat dalam perniagaan kejuruteraan awam dan terutamanya terlibat dalam pelbagai perkhidmatan pembinaan. Memandangkan syarikat tersebut tidak dapat membayar hutangnya kepada pemiutang tetapi masih merupakan perusahaan perniagaan yang aktif dengan projek pembinaan yang sedang dijalankan yang menjana pendapatan, satu ahli syarikat ('pemohon') telah memfailkan saman pemula semasa ('SP') untuk memohon kebenaran mahkamah berkenaan dengan skim perkiraan menurut s 366(3) Akta Syarikat 2016 ('AS'). Di bawah skim tersebut, pemiutang skim telah dikategorikan kepada dua kategori yang dikenali sebagai Kategori A dan Kategori B. Kaedah penyelesaian bagi kedua-dua kategori adalah sama di mana 20% daripada jumlah yang dikompromi pemiutang skim akan dibayar secara tunai dan baki 80 % akan dibayar melalui penukaran kepada stok pinjaman bercagar boleh tebus ('RSLS') yang dikeluarkan oleh syarikat tersebut. Pada 29 Mac 2021, perintah ex parte ('perintah ex parte tersebut') telah diberikan oleh mahkamah untuk syarikat tersebut mengadakan mesyuarat pemiutang ('CCM'). Selepas itu, pada 16 Jun 2021, CCM telah dipanggil, dan pernyataan penjelasan ('ES') telah dibincangkan dan dijelaskan kepada semua pemiutang skim. Pada akhir

proses, majoriti pemiutang skim telah mengundi menyokong skim yang dicadangkan. Dalam menentukan permohonan kebenaran semasa, mahkamah telah mempertimbangkan isu-isu berikut: (a) sama ada keperluan statutori s 366(1) dan (3) AS telah dipatuhi berhubung dengan CCM khususnya, keperluan bahawa 75% daripada jumlah pemiutang atau kelas pemiutang atau ahli atau kelas ahli yang hadir dan mengundi telah dipenuhi ('Keperluan Ambang 75%'); (b) sama ada kelas tersebut diwakili secara adil oleh mereka yang menghadiri mesyuarat tersebut dan bahawa majoriti berkanun bertindak bona fide dan tidak memaksa minoriti untuk mempromosikan kepentingan yang bertentangan dengan kepentingan kelas yang mereka wakili ('ujian bona fide'); dan (c) sama ada skim perkiraan tersebut adalah skim yang secara munasabah mungkin dibenarkan oleh seorang lelaki yang bijak dan jujur, ahli kelas berkenaan dan bertindak ke atas kepentingannya ('ujian kewajaran').

Diputuskan, membenarkan SP tanpa perintah berkenaan kos:

(1) Terdapat tiga peringkat dalam proses penstrukturan semula di bawah s 366 AS. Tiga peringkat tersebut ialah peringkat permohonan, peringkat mesyuarat, dan peringkat kebenaran. Saman pemula semasa adalah berkaitan dengan peringkat kebenaran. Mahkamah mendapati bahawa SP di peringkat permohonan masih belum dimuktamadkan sepenuhnya, oleh itu, permohonan untuk mendapatkan kebenaran hendaklah dibuat melalui notis permohonan di bawah tindakan peringkat permohonan/saman pemula. Jika saman pemula baru difailkan di peringkat kebenaran, perkara tersebut boleh didengar oleh hakim yang berbeza dan pemohon sering meminta supaya perkara tersebut didengar oleh hakim yang sama yang memberikan perintah di peringkat permohonan memandangkan hakim tersebut akan biasa dengan proses penstrukturan semula pemohon (lihat perenggan 35 & 41–44).

(2) Mahkamah mendapati pemohon telah mematuhi syarat perintah ex parte tersebut dan skim tersebut telah diluluskan sebanyak 88.28% daripada jumlah pemiutang skim. Oleh itu, pemohon telah memenuhi keperluan statutori s 366(3) AS dalam mendapatkan minimum 75% daripada jumlah pemiutang skim dan sebenarnya telah melebihi keperluan minimum tersebut (lihat perenggan 47–49).

(3) Syarikat-syarikat yang berkaitan dengan syarikat tersebut semuanya adalah pemiutang tidak bercagar. Dalam kes pembubaran, mereka berhak menuntut terhadap syarikat tersebut, dan mereka akan diletakkan dalam kedudukan pari passu antara satu sama lain dan dengan pemiutang tidak bercagar yang lain. Oleh itu, mahkamah bersetuju dengan pemohon bahawa syarikat-syarikat ini harus diklasifikasikan dalam kelas yang sama dengan pemiutang tidak bercagar yang lain. Dalam keadaan tersebut, klasifikasi pemiutang skim adalah wajar kerana mereka diklasifikasikan berdasarkan 'hak mereka terhadap syarikat',

bukan 'kepentingan' mereka. Memandangkan mahkamah telah memutuskan bahawa klasifikasi pemiutang skim adalah wajar, maka tidak ada alasan mengapa undi pemiutang skim yang berkaitan dengan syarikat tersebut harus diketepikan atau diabaikan (lihat perenggan 67, 76 & 79)

(4) Berkenaan dengan dakwaan responden-responden bahawa skim tersebut tidak adil dan tidak jujur kerana ES yang diberikan kepada pemiutang skim mengandungi maklumat yang mengelirukan, mahkamah mendapati aduan responden-responden bukanlah kerana maklumat tersebut mengelirukan atau tidak mencukupi. Sebaliknya, kritikan responden-responden terhadap skim tersebut adalah sesuatu yang timbul selepas CCM dijalankan dan tertumpu kepada mencabar skim tersebut dengan mencari kelemahan di dalamnya selepas ia diluluskan oleh majoriti pemiutang skim. Mahkamah mendapati tiada merit dalam aduan responden mengenai isu ini bahawa skim tersebut tidak adil dan tidak bona fide (lihat perenggan 129–130).

(5) Walaupun responden-responden mendakwa bahawa ujian bona fide tidak dipenuhi, mereka tidak menunjukkan apa-apa keterangan bahawa kelas tersebut tidak diwakili secara adil atau majoriti tidak bertindak bona fide atau bahawa minoriti dipaksa untuk mempromosikan kepentingan yang bertentangan dengan kepentingan bagi kelas yang kononnya diwakili oleh mereka. Berhubung dengan hujah bahawa skim tersebut tidak munasabah, mahkamah menerima alasan dan tujuan pemohon skim seperti yang dinyatakan dalam perenggan 55 alasan penghakiman. Mahkamah tidak mendapati skim tersebut tidak munasabah. Oleh itu, mahkamah mendapati bahawa ujian bona fide dan kewajaran kedua-duanya telah dipenuhi. Mahkamah sedar dan berhati-hati tentang fakta bahawa mahkamah tidak seharusnya memulakan analisis terperinci tentang merit skim tersebut berbanding skim yang lain dan menggantikan penghakiman komersial pemiutang skim dengan penghakiman mahkamah. Berdasarkan autoriti seperti kes *Re Apcoa Parking Holdings GmbH and others* [2016] 1 All ER (Comm) 30, tiada sebab untuk mahkamah tidak menguatkuasakan keputusan majoriti pemiutang skim yang telah memenuhi dan melebihi keperluan ambang 75% yang ditetapkan oleh undang-undang (lihat perenggan 85, 132, 134, 136 & 146).]

Cases referred to

ACM Gold Ltd, Re (1992) 7 ACLR 231, FC (refd)
AirAsia X Bhd v BOC Aviation Ltd & Ors [2021] 10 MLJ 942, HC (refd)
Apcoa Parking Holdings GmbH, Re [2016] 1 All ER (Comm) 30, Ch D (folld)
App (Hong Kong) Ltd, Re [2004] HKCU 477, CA (refd)
Axa Asia Pacific Holdings Ltd, Re [2011] VSC 4, SC (folld)
BRL Hardy Ltd, Re [2003] 45 ACSR 397, SC (folld)

Century Sun International, Re [2021] HKCU 4788 (refd)
Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd [2014] 6 MLJ 56, FC (refd)
Kansa General International Insurance Co Ltd (in compulsory liquidation), Re [1999] 1 HKC 254 (refd)
Landmark Corporation Ltd, Re [1968] 1 NSWR 759, SC (refd)
Lehman Brothers International (Europe) (in administration), Re [2018] EWHC 1980 (Ch), Ch D (refd)
National Bank Ltd, Re [1966] 1 All ER 1006, Ch D (refd)
Sateras Resources (Malaysia) Bhd, In Re [2005] MLJU 678; [2005] 6 CLJ 194, HC (refd)
Sentoria Bina Sdn Bhd v Impak Kejora Sdn Bhd & Ors [2021] 12 MLJ 690; [2021] 9 CLJ 814, HC (folld)
Sonodyne International Ltd, Re [1994] 15 ACSR 494, SC (folld)
Sovereign Life Assurance Co v Dodd [1892] 2 QB 573, CA (refd)
Telewest Communications plc (No 2); Re Telewest Finance (Jersey) Ltd (No 2), Re [2005] 1 BCLC 772 (refd)
The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal [2012] SGCA 9; [2012] 2 SLR 213, CA (distd)
Transmile Group Bhd & Anor v Malaysian Trustee Bhd & Ors [2012] MLJU 130; [2012] 9 CLJ 1071, HC (folld)
UDL Holdings Ltd & Ors, Re [2002] 1 HKC 172 (refd)
UDL Holdings Ltd & Ors, Re [2006] HKCU 917 (refd)
Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd [2003] SGCA 23, CA (refd)

Legislation referred to

Companies Act 2016 ss 366, 366(1), (1)(b), (2), (3), (4), 368, 368(2), (2)(d)
Rules of Court 2012

Yap Boon Hau (with Goh Zhi En) (Mah-Kamariyah & Philip Koh) for the applicant.
Lee Kai Jun (Wayne Siang, Kai & Co) for the respondents.

Wan Muhammad Amin JC:

[1] This was an application by the plaintiff via originating summons dated 23 June 2021 (encl 1) ('this originating summons') for sanction of the court in respect of a scheme of arrangement pursuant to, inter alia, s 366(3) of the Companies Act 2016 ('the CA 2016 2016'). The reliefs prayed for in this originating summons are specifically as follows:

1. That the Scheme of Arrangement of *BGMC Corporation Sdn Bhd*

[Company Registration No.: 199601008689 (381037-A)] ('BGMCCSB') as set out in the Explanatory Statement dated 25-5-2021 as annexed herein as 'Lampiran A', which has been circulated to all Scheme Creditors and approved by the Scheme Creditors in the Court Convened Creditors' Meeting on 16-6-2021, be approved by this Honourable Court and bind on BGMCCSB and all Scheme Creditors with effect from the date of this Order in accordance to Section 366(3), (4), and (5) of the Companies Act 2016

2. That BGMCCSB shall send by ordinary post (proof of which by way of certificate of posting) a copy of this Order to the Scheme Creditors to their last known address of each of the Scheme Creditors OR by email to the email address of the Scheme Creditors, and to advertise this Order once in English in 'New Straits Times' and once in Malay in 'Berita Harian' newspapers within twenty-one (21) days from the date of the sealed Order being extracted;

3. That BGMCCSB shall serve a copy of this Order to Companies Commission of Malaysia within fourteen (14) days from the date of the sealed Order being extracted;

4. That BGMCCSB be exempted from complying with the requirement to annex this Order to every copy of the constitution of BGMCCSB issued after this Order has been made in accordance to Section 366(6) and (7) of the Companies Act 2016

5. That the Applicant be at liberty to apply; and

6. Such further and/or other relief as this Honourable Court deems fit.

[2] After hearing arguments from all the parties, I granted order in terms of this originating summons on 13 January 2022 ('sanction order') and included an addition order as follows:

> As a condition for approval of the Scheme of Arrangement, the 43 parcels of retail lots known as V Residensi 2 @ Shah Alam identified in paragraph 26.1 of the Explanation Statement at page 196 of the Applicant's Affidavit In Support affirmed on 28.12.2021 in Enclosure 98, be discharged from encumbrances imposed by the banks, within 30 days from the date of this Order;

[3] The respondents were made parties to this originating summons pursuant to four consent orders that were entered on 26 July 2021. The applicant had agreed to allow the respondents to intervene and oppose this originating summons.

SALIENT BACKGROUND FACTS

The applicant

[4] The applicant is the shareholder of BGMC Corp Sdn Bhd ('BGMCCSB'). The applicant owns 100% of the ordinary shares issued by BGMCCSB and enjoys 100% of voting rights in BGMCCSB:

Directors	1. Dato' Teh Kok Lee 2. Dato' Mohd Arifin bin Mohd Arif
Shareholders	1. BGMC Malaysia Ltd

BGMC Corp Sdn Bhd ('BGMCCSB')

[5] BGMCCSB has a total issued and paid up capital of RM99.3m consisting of 10,000,000 ordinary shares (2,000,000 ordinary shares with cash consideration and 8,000,000 ordinary shares with consideration otherwise than cash), and 89,300,000 preference shares (31,730,000 preference shares with cash consideration and 57,570,000 preference shares with consideration otherwise than cash). The preference shareholder has no voting right like ordinary shareholder. As such, the applicant is the *sole controlling shareholder* of BGMCCSB:

Directors	1. Dato' Teh Kok Lee 2. Azham Malik bin Mohd Hashim 3. Dato' Mohd Arifin bin Mohd Arif (resigned on 30 August 2021)
Shareholders	1. BGMC Holdings Bhd — 10,000,000 ordinary shares 2. Sparks Energy 1 Sdn Bhd — 89,300,000 preference shares

[6] BGMCCSB is in the business of civil engineering and principally engaged in a wide range of construction services. It has over 20 years of proven tracked record with extensive experience and expertise, particularly in the area of Public Private Partnership Projects based on the Built, Lease, Maintain and Transfer model. Its major clients comprise of established developers and government link companies.

BGMC International Ltd ('BGMCIL')

[7] BGMC International Ltd ('BGMCIL') owns 100% shares in BGMC Malaysia Ltd, and it *indirectly* owns 100% shares in the applicant. Thus, it is the *ultimate holding company* of BGMCCSB. BGMCIL is a company incorporated in Cayman Islands with limited liability on 18 November 2016. BGMCIL's shares are listed on Stock Exchange of Hong Kong Ltd:

Directors	1. Dato' Teh Kok Lee 2. Dato' Mohd Arifin bin Mohd Arif (resigned on 30 August 2021) 3. Kua Choh Leang 4. Tan Sri Dato' Seri Kong Cho Ha 5. Datuk Kamalul Arifin bin Othman
Shareholders	1. Prosper International Business Ltd — 48% 2. Seeva International Ltd — 19.1% 3. Kingdom Base Holdings Ltd — 7.9% 4. Public float — 25%

Background of the scheme of arrangement

[8] The background of the scheme of arrangement ('Scheme') as stated by the applicant in its affidavit in support (encl 2) is as stated below.

[9] Due to the sluggish property market and global economic turbulence resulting from the COVID-19 outbreak, the financial performance of BGMCCSB had been affected and it has then been in financial difficulties as it recorded a net loss of RM67,910,872 during financial year 2019 (on audited account) and RM144,392,144 (on management account) as at 28 February 2021.

[10] BGMCCSB's construction project work schedules were affected by the disruption to the supply of building materials when China imposed a lockdown on its major cities to contain the spread of the COVID-19. Substantial amount of building materials of BGMCCSB are imported from China.

[11] Thereafter on 18 March 2021, Malaysian Government implemented the movement control order ('MCO') which had stopped and limited the operation of construction works of BGMCCSB.

[12] As consequence thereof, BGMCCSB's cash flow was affected. Due to the slowing down of property markets and decrease of operation for construction activity on site, the profit generated from the operation has substantially decreased. This led to a deteriorating liquidity position and BGMCCSB became increasingly unable to meet its working capital requirements and satisfy its debt obligations.

[13] However, BGMCCSB is still an active business enterprise with *on-going* construction projects which are revenue-generating.

[14] In view of the aforesaid, BGMCCSB urgently needed to restructure its financial affairs to meet its obligation to pay the outstanding debts. Hence, a scheme of arrangement was proposed to allow the unsecured creditors whose debts are unsecured, to receive a higher return than they would otherwise receive in a liquidation scenario.

THE FIRST SCHEME

[15] The following are the particulars of the scheme first proposed to the scheme creditors:

(a) the proposed scheme aimed to restructure BGMCCSB's debts of RM271,076,432.87 owed to the scheme creditors (as at 28 February 2021);

(b) the scheme liabilities comprise of the amounts of unsecured liabilities owed to the scheme creditors, who would be categorised into two categories:

(i) Category A:

Scheme creditors whose debts were incurred for providing goods and services for projects that have been completed or handed over or terminated.

Settlement of Category A Scheme Creditors' claims at RM0.30 to every RM1 owed on the principal amount.

The amount owing to BGMCIL (amounted to RM124,987,469.48 as at 28 February 2021) are *included* in this category, in which such amount (RM37,496,240.84 upon waiver of 70% of the amount owed) would be *subordinated* until all the debts for the remaining scheme creditors are fully settled.

(ii) Category B:

Scheme creditors who are existing customers/suppliers/vendors of BGMCCSB for ongoing or upcoming projects.

Settlement of Category B scheme creditors' claims at RM0.50 to every RM1 owed on the principal amount.

[16] On 17 March 2021, the applicant vide High Court of Kuala Lumpur Originating Summons No WA-24NCC-125–03 of 2021 ('OS 125'), applied for leave to convene the court convened creditor's meeting ('CCM') and for a restraining order to preserve the assets of BGMCCSB pending approval of the scheme by the scheme creditors and the court.

[17] An ex parte order dated 29 March 2021 ('ex parte order') was granted for BGMCCSB to convene the CCM and a restraining order to restrain

action/proceedings against BGMCCSB ('restraining order'). Further, the applicant on 6 April 2021, applied to court vide a notice of application in encl 16 of OS 125, for a *validation order* for BGMCCSB to dispose of the 100% paid up shares in KAS Engineering Sdn Bhd for a total consideration of RM93,787,000, in which RM40m of the consideration is to be used for the purpose of the scheme.

[18] The restraining order granted vide the ex parte order had expired on 26 June 2021. As such, BGMCCSB had applied to the court to intervene in OS 125 and for an extension of the restraining order. The court had on 8 July 2021 and 26 July 2021 respectively, allowed the intervention of BGMCCSB in OS 125 and the extension of the restraining order for a period of nine months from 27 June 2021.

The proposed scheme for sanction

[19] Subsequent to the order dated 29 March 2021 being granted, BGMCCSB together with their scheme adviser had engaged with the scheme creditors, particularly with the existing contractors and suppliers which form the major bulk of the creditors to present the proposed scheme and to gain their feedbacks and comments.

[20] Some of the scheme creditors had expressed their concern over the discount rate proposed and the uncertainty associated with the issuance of ordinary shares in the special purpose vehicle ('SPV')/BGMC Estate Sdn Bhd. As such, taking into account the feedbacks and comments from the scheme creditors, BGMCCSB had *improved, revised and formulated* the explanatory statement dated 25 May 2021 ('ES' or 'Explanatory Statement') with modification to the originally proposed scheme as follows:

No.	Details	Original Scheme	ES
1.	Discount rate for Category A Scheme Creditors	70%	50%
2.	Discount rate for Category B Scheme Creditors	50%	30%
3.	Repayment of 20% claims (after waiver)	Cash	Cash

No.	Details	Original Scheme	ES
4.	Repayment of 80% claims (after waiver)	Issuance of ordinary shares of RM1 each in the issued and paid up share capital of BGMC Estate Sdn Bhd/special purpose vehicle ('SPV')	Redeemable Secured Loan Stock to be issued by BGMCCSB to be redeemed in full without any set-off or withholding or deduction within 36 months from date of issue.

[21] The position of the scheme creditors has been improved as compared to the first proposed scheme as follows:

(a) the scheme creditors will receive higher return percentage; and

(b) the repayment of 80% claims would be vide issuance of redeemable secured loan stock which is to be redeemed in full without any set off or withholding or deduction, which provide more certainty to the scheme creditors as compared to issuance of ordinary shares in the BGMC Estate Sdn Bhd/the SPV as proposed in the first proposed scheme.

[22] On 25 May 2021, BGMCCSB had circulated the notice of CCM, the ES and form of proxy to the scheme creditors. On the same day, the notice of CCCM was advertised in Malay language once in *Berita Harian* and in English language once in *The Star* newspaper.

[23] After finalisation of amounts owed to scheme creditors as at 28 February 2021 by examining the proof of debts and relevant supporting documents from the scheme creditors, the *liabilities* in book comprises the claim of principal amounts by the scheme creditors (excluding all interest, penalty and/or default interest, late payment interest, costs and other charges of a similar nature in payments incidental thereto (including but not limited to all legal fees) accrued and to be accrued) up to and including 28 February 2021 of approximately *RM263,663,093.54*.

[24] The scheme creditors will *not* be divided *into classes* but shall be categorised into two categories, namely Category A scheme creditors and Category B scheme creditors as follows:

(a) Category A scheme creditors:

Scheme creditors whose debts were incurred for providing goods and services for projects that have been completed or handed over or terminated. Also included in this category are the amounts owing to the

BGMCIL, whose debts will be subordinated until all the debts of the scheme creditors are fully settled and redeemable secured loan stocks to be issued by BGMCCSB ('RSLS') redeemed.

The amount owing to Category A scheme creditors amounted to RM199,141,624.38 as at 28 February 2021;

(b) Category B scheme creditors:

Scheme creditors who are existing customers/suppliers/vendors of BGMCCSB for ongoing projects.

The amount owing to Category B scheme creditors amounted to RM64,521,469.16 as at 28 February 2021.

[25] BGMCCSB's liabilities in book will be settled on the following salient terms as provided in the ES:

(a) Category A scheme creditors' compromised sum to be settled at RM0.50 for every RM1 owed on the principal amount;

(b) Category B scheme creditors' compromised sum to be settled at RM0.70 for every RM1 owed on the principal amount;

(c) the settlement of the Category A and Category B scheme creditors' compromised sum shall be carried out in the following manner:

(i) settlement of *20%* of both Category A scheme creditors' compromised sum and Category B scheme creditors' compromised sum, to be *paid in cash* within three months of the effective date; and

(ii) settlement of *80%* of both Category A scheme creditors' compromised sum and Category B scheme creditors' compromised sum, via conversion into *RSLS* to be issued by BGMCCSB within three months of the effective date subject to the requisite approvals of the relevant authorities being obtained. For the purposes of such conversion of debts into RSLS, in the event any part of the amount of net debt due to any scheme creditors is less than RM1, those scheme creditors irrevocably waive such amount which is less than RM1 in connection with the conversion.

[26] Upon implementation of the scheme, the amounts payable to scheme creditors are summarised in the table below:

	CATEGORY A (50% waiver)	CATEGORY B (30% waiver)	TOTAL
Total Amount Owed	RM199,141,624.38	RM64,521,469.16	RM263,663,093.54

	CATEGORY A (50% waiver)	CATEGORY B (30% waiver)	TOTAL
Total Amount Payable After Applying Waiver	RM99,570,812.19	RM45,165,028.41	RM144,735,840.60
— by way of Issuance of RSLS (80%)	RM79,656,649.75	RM36,132,022.73	RM115,788,672.48
— by way of Cash (20%)	RM19,914,162.44	RM9,033,005.68	RM28,947,168.12

[27] The following are the projected income which BGMCCSB intends to utilise to repay the scheme creditors and details of how the said income will be applied:

Source of Cash Flow	Amount (RM)
Proceeds from the disposal of KAS Engineering Sdn Bhd	40m
43 parcels of retail lots known as V Residensi 2@Shah Alam ('Retail Lots')	25m
Contra Properties from debtor ('Contra Properties')	36,098,440
Estimated collection through various future projects secured within 24 months ('future projects')	6,204,961.13
	107,303,401.13

Proceeds from disposal of KAS Engineering Sdn Bhd ('KAS'):

(a) the total consideration of disposal of KAS amounted to RM93,787,000;

(b) part of the proceeds from the disposal of KAS will be used for repayment of overdue bank facilities/rescheduled overdue bank facilities;

(c) the sum of RM4m from the disposal of KAS will be utilised for the repayment to the scheme creditors; and

(d) the disposal of KAS has completed as at 11 June 2021.

A Retail lots:

The market value of the retail lots have been appraised at RM25m, pursuant to valuation conducted by Messrs Firdaus & Associates dated 30 September 2020.

B Contra Properties:

The Contra Properties comprise of service apartment units, small office flexible office units, shop lots and land received from BGMCCSB's debtor, with total market value of RM36,098,440.

C Future projects:

BGMCCSB is currently engaging in various projects and the sum of RM6,204,961.13 from the estimated amounts to be collected from the future D projects, will be utilised for the repayment to the scheme creditors.

[28] It is important to note that BGMCIL's debt of RM124,987,469.48 under the scheme will be *subordinated* until *all* claims of the other scheme creditors are fully settled and RSLS to be issued by BGMCCSB redeemed as E stated in para 29 of encl 2 as follows:

> The settlement of debts owing to BGMCIL, the ultimate holding company (amounting to RM124,987,469.48 as at 28-2-2021; RM62,493,734.80 upon the waiver of 50% of the amount owed) *will be subordinated until all the claims of the other Scheme Creditors are fully settled and RSLS to be issued by BGMCCSB redeemed*. F However, the voting rights shall remain unchanged. (Emphasis added.)

[29] The CCM was called on *16 June 2021* by way of a virtual meeting via an online remote participation and voting ('RPV') facilities at Tricor Investor & Issuing House Services Sdn Bhd ('Tricor') TIIH online website, being an G online platform in Malaysia. BGMCCSB appointed Tricor as the poll administrator and official scrutineer to verify the poll result of the CCM.

[30] During the CCM, the terms of the explanatory statement were H deliberated and explained to all the scheme creditors who were present. The voting procedures through the remote voting facility and the manner to submit questions in real time were also explained to the scheme creditors who were present at the CCM.

I **[31]** Before the scheme creditors cast their votes on the proposed scheme, a question and answer session ('Q&A session') was opened to the floor. The scheme creditors were given the opportunity to raise any questions, issues and/or concern with regard to the proposed scheme.

[32] The queries raised were dealt with and addressed by the chairman, the scheme adviser, the solicitors for the applicant and/or the authorised representative of the applicant.

[33] After the Q&A session had ended, the motion for the proposed scheme was put to the floor for voting. The poll results showed that the scheme creditors who were present at the CCM in person and by way of proxy had voted in support of the proposed scheme.

[34] The results of the poll are as follows:

	Voted for	Voted against	Abstain
Value	195,423,386	25,943,524 First respondent: Nil Second respondent: 691,632 Third respondent: 3,056,711 Fourth respondent: 753,951 Other votes Against: 21,441,230	6,154,151
Percentage (%)	882,803	11.7197	–

LEGAL REQUIREMENTS AT THE SANCTION STAGE OF THE SCHEME

[35] This originating summons is in respect of the third and final stage of the three stages of the restructuring process under s 366 of the CA 2016. For brevity, the three stages are as follows:

(a) the application stage where an application is made to the court for leave to convene the CCM;

(b) the meeting stage where the CCM will be held with the company's scheme creditors and in the present case, BGMCCSB's scheme creditors; and

(c) the sanction stage where an application is made to the court for the court to approve the proposed scheme of arrangement ('application for sanction').

[36] The relevant provisions of CA 2016, namely ss 366(1), (2), (3) and (4) are reproduced below:

> (1) The Court may, *on an application* under this Subdivision, order a *meeting* in a summary way to be *summoned in such manner as the Court directs*, *by* either —
>
> (a) the company;

(b) any creditor or *member of the company*

(c) the liquidator, if the company is being wound up; or

(d) the judicial manager, if the company is under judicial management.

(2) A meeting held pursuant to an order of the Court made under subsection (1) may be adjourned if the resolution for adjournment is approved by seventy-five per centum of the total value of creditors or class of creditors or the members or class of members present and voting either in person or by proxy at the meeting.

(3) The *compromise or arrangement shall be binding* on —

(a) all the creditors or class of creditors;

(b) the members or class of members;

(c) the company; or

(d) the liquidator and contributories, if the company is being wound up,

if the compromise or arrangement *is agreed by a majority of seventy- five per centum of the total value of the creditors or class of creditors or members or class of members present and voting* either in person or by proxy at the meeting or the adjourned meeting *and has been approved by order of the Court*.

(4) The *Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as the Court thinks just*. (Emphasis added.)

[37] It is important to note that the applicant here is not the company itself but a member of the company for which the scheme is proposed, BGMCCSB (s 366(1)(b) of the CA 2016).

PROCEDURE

[38] Whilst it was not made an issue by the respondents in this originating summons, I observed that the application for sanction was made via an originating summons and not via a notice of application filed under the application stage in OS 125.

[39] There is nothing in the Rules of Court 2012 ('the ROC') or CA 2016 which specifies the method in which the application for sanction needs to be made, ie via the filing of a fresh originating summons or by way of a notice of application made under the application stage.

[40] It has been said that once the court grants the orders under the originating summons at the application stage the action is concluded. It is therefore said that there would no longer be a pending suit or *lis pendens*. This then necessitates an applicant who wishes to obtain the court's sanction in respect of a scheme of arrangement under s 366(3) of the CA 2016 to file a fresh action via an originating summons.

[41] However, I am of the view that the action or originating summons at the application stage is not *completely* concluded for the following reasons:

(a) the order for a CCM applied for at the application stage usually comes with a prayer for a restraining order under s 368 of the CA 2016 and may and often do require extension as the initial restraining order is valid for three months only (s 368(2) of the CA 2016). The applicant will then have to make the application to extend the restraining order in the same originating summons under the application stage;

(b) the applicant may also require a validation order for the disposal of the property or shares of or owned by the company for which the scheme of arrangement is proposed;

(c) there could also be variations or changes to the originally proposed scheme of arrangement which may then require the applicant to apply for further orders. For example, during the height of the COVID-19 pandemic there were applications made to court for the CCM to be conducted virtually instead of physically as originally proposed in the scheme of arrangement; and

(d) very often the orders granted in an originating summons at the application stage includes a relief that the applicant be given liberty to apply to cater for, inter alia, changes in the proposed scheme of arrangement.

[42] The circumstances stated above would mean that the originating summons at the application stage is still not completely concluded. This is in addition to the fact that the restructuring process under s 366 of the CA 2016 comes in three stages and therefore once the court grants orders under the originating summons at the application stage, the matter is in a state of 'stasis'. Depending on the outcome of the CCM the restructuring process could proceed to the sanction stage. Hence the originating summons filed under the application stage may still be *lis pendens*.

[43] I am of the considered view that for the above reasons and in particular for practical reasons the application for sanction should be made via a notice of application under the application stage action/originating summons. This is because the applicant at the sanction stage would have to set out the background and the events that have transpired from application stage to the CCM until sanction of the court is applied for. This would include reporting to the court on the compliance with the orders given at the application stage. In this regard the documents in respect of the application stage and the information regarding the orders that were made would already be in that court's record.

[44] Further, if a fresh originating summons is filed at the sanction stage, the matter may be heard by a different judge and the applicant would often request for the matter to be heard by the same judge who granted the orders at the application stage as that judge would be familiar with the applicant's restructuring exercise.

Factors to be considered at the sanction stage

[45] There are three factors that the court considers at the sanction stage as stated in the following cases:

(a) *Re Telewest Communications plc (No 2); Re Telewest Finance (Jersey) Ltd (No 2)* [2005] 1 BCLC 772 where it was held as follows:

> [20] The classic formulation of the *principles which guide the court* in considering whether to *sanction a scheme* was set out by Plowman J in *Re National Bank Ltd* [1966] 1 All ER 1006 at p 1012; [1966] 1 WLR 819 at p 829 by reference to a passage in Buckley on the *Companies Acts* (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions:
>
> > *In exercising its power of sanction the court will see, first*, that the provisions of the statute have been complied with; *secondly*, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and *thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve*.
> >
> > *The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.* (Emphasis added.)

(b) *Transmile Group Bhd & Anor v Malaysian Trustee Bhd & Ors* [2012] MLJU 130; [2012] 9 CLJ 1071 where it was held as follows:

> [23] Prior to considering each of these issues in turn, it is relevant to have regard to the *general principles by which the court is guided when considering a petition under* s 176(3) of the Companies Act 1965. Learned counsel for MTB in his submissions set out the relevant case law. This is not in dispute. *In Re Sateras Resources (Malaysia) Bhd* [2005] MLJU 678; [2005] 6 CLJ 194 Ramly Ali J (later FCJ) adopted the principles set out in Buckley on the *Companies Act* (14th Ed), 1981, pp 473–474:
>
> > ... In exercising the power of sanction the court will see, first, that the provisions of the statute have been complied with, second that the class

was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve. (Emphasis added.)

[46] To summarise, the court needs to consider the following at the sanction stage:

(a) whether the statutory requirements of s 366(1) and (3) of the CA 2016 have been complied with regards to the CCM in particular, the requirement that 75% of the total value of the creditors or class of creditors or members or class of members present and voting has been met ('the 75% threshold requirement');

(b) whether the class was *fairly represented* by those who attended the meeting *and* that the statutory majority are *acting bona fide and* are *not coercing* the minority in order to promote interests adverse to those of the class whom they purport to represent ('the bona fide test'); and

(c) whether the scheme of arrangement is such as an *intelligent and honest man*, a member of the class concerned and acting in respect of his interest, *might reasonably approve* ('the reasonableness test').

FULFILLMENT OF THE STATUTORY AND OTHER REQUIREMENTS

[47] In so far as the ex parte order is concerned the applicant has complied with the terms of the ex parte order as follows:

(a) the CCM was held virtually on 16 June 2021, which is within 90 days from the date of the ex parte order;

(b) notice of CCM, the ES and the form of proxy ('documents') were posted to the last known address of each of the scheme creditors on 25 May 2021, which is not less than 21 days' notice before the CCM, the documents were also made available on the website at https://www.bgmc.asia;

(c) the notice of the CCM was advertised once in Malay in 'Berita Harian' and once in English in 'The Star' newspapers both on 25 May 2021, which is not less than 21 days' notice before the CCM;

(d) a copy of the documents was made available to the scheme creditors at the registered office of BGMCCSB at No 18–3, Jalan PJU 8/5C, Damansara Perdana, 47820 Petaling Jaya, Selangor on working days between the hours of 9am to 5pm;

(e) the chairman of the CCM had reported to the court hearing OS 125, the results of the CCM;

(f) Dato' Teh Kok Lee was nominated by the majority of the scheme creditors as a director of BGMCCSB (s 368(2)(d) of the CA 2016). The total amount of scheme creditors who nominated his appointment as director under s 368(2)(d) of the CA 2016 stands at 74%, representing the value of RM194,903,361.76;

(g) on 8 April 2021, the contents of the s 368 of the CA 2016 order was served and effected by way of advertisement of the order once in Malay in 'Berita Harian' and once in English in 'New Straits Times' newspapers both; and

(h) on 10 April 2021, the same was also advertised once in English in 'The Star' newspaper.

[48] The scheme was approved by *88.28%* of the value of the scheme creditors.

[49] Therefore, the applicant has satisfied the statutory requirement of s 366(3) of the CA 2016 in obtaining minimum 75% in value scheme creditors and has in fact exceeded the said minimum requirement.

[50] In *Re ACM Gold Ltd* (1992) 7 ACLR 231, the Federal Court of Australia held that the following requirements have to be satisfied at the sanction stage:

(a) the CCM must be convened and held in accordance with the court order granted at the meeting stage (which in Malaysia would be under s 366(1) of the CA 2016); and

(b) the scheme creditor must have approved the scheme of arrangement with the requisite majority as provided under the relevant statutory provision (present case under s 366(3) of the CA 2016 or the 75% threshold requirement).

(see also *Transmile*).

[51] As stated earlier the applicant has complied with the ex parte order in convening the CCM and as the applicant has also satisfied the 75% threshold requirement, it is now incumbent upon me to consider whether the scheme has passed the bona fide and the reasonableness tests.

[52] In order to assess the 'reasonableness' and fairness of the scheme, the court would have to apply the reasonable businessman test (*Sentoria Bina Sdn Bhd v Impak Kejora Sdn Bhd & Ors* [2021] 12 MLJ 690; [2021] 9 CLJ 814; *Re*

Axa Asia Pacific Holdings Ltd [2011] VSC 4; *Re BRL Hardy Ltd* [2003] 45 ACSR 397; *Re Sonodyne International Ltd* [1994] 15 ACSR 494; *Transmile*). A

[53] The position taken in the above cases can be summarised as follows:

(a) the court's role is *supervisory* at the sanction stage (*Re Axa*); B

(b) the court does *not second guess* the commercial judgment of the shareholder and substitute it with its own commercial judgment (*Re Axa*; *Re BRL Hardy*; *Re Sonodyne*; *Sentoria*);

(c) 'Whether it is reasonable to suppose that sensible business people might consider that the arrangement proposed by the company is of benefit to its members' (*Re Sonodyne*); and C

(d) the court ought *not* embark on a careful analysis and dissection of the relative merits of one scheme as opposed to another or assessing the viability and benefit of the scheme of arrangement as against the winding up of the company (*Transmile*). D

[54] Applying the principles stated above, in order for me to effectively determine whether the applicant has satisfied the bona fide and the reasonableness tests, I will need to consider the applicant's reasons for the scheme together with the objections raised by respondents. E

The applicant's position

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[55] The reasons for which the applicant sought this court's sanction of the scheme as submitted by learned counsel for the applicant are summarised as follows:

(a) BGMCCSB requires the sanction of the scheme in order to pay off its debts under 30 pending suits in various courts in Malaysia against BGMCCSB as at 15 May 2021; G

(b) the scheme is needed so that BGMCCSB can continue with its 3 major projects, namely T035-Spice Hotel, T306-Seputeh and T042-Bangsar. These three projects are expected to be completed within the period of 12 to 24 months; H

(c) with the sanction of the scheme, BGMCCSB can ensure that the work programme and resources allocated to the completion of the above projects will not be affected. Further, BGMCCSB will then be able to focus on securing more works and projects, and enable itself to continue as a going concern. Going concern of BGMCCSB is in turn needed to be able to generate income to pay the debts to the other unsecured creditors; I

(d) if the proposed scheme is not sanctioned and BGMCCSB is wound up:

(i) RM65,656,286 of the assets are subject to specific charges. Upon liquidation, these assets' estimated realisable value amounts to only RM57,662,438, and it is estimated to be a deficit at RM71,707,626 for repayment to the secured creditors;

(ii) in terms of unencumbered assets, the net book value of the non-current assets of BGMCCSB is at RM16,052,281. However, the estimated realisable value is at RM587,154 as most of the non-current assets of BGMCCSB are the value invested in subsidiary which are not readily realisable upon liquidation;

(iii) for the unencumbered current assets, the net book value is of RM305,656,741, but the estimated realisable value amounts to only RM24,961,993; and

(iv) as such, the total book value of the assets despite being RM387,365,309, only RM25,549,147 is estimated to be available for the unsecured creditors, and at the same time, amount of RM71,707,626 will need to be repaid to the secured creditors who enjoy priority over the unsecured creditors. Thus, it is estimated that in a liquidation scenario, the unsecured creditors would be able recover only RM0.06 to every RM1 owed.

(e) under the scheme:

(i) there is only 50% compromise of the debts owed to Category A Scheme Creditors and 30% compromise of the debts owed to Category B Scheme Creditors;

(ii) immediately within three months after the scheme becomes effective, 20% of the compromised sums owed to both Category A and Category B Scheme Creditors shall be settled by payment in cash;

(iii) the remaining 80% of the compromised sums shall be converted into RSLS to be issued by BGMCCSB within three months after the scheme becomes effective, this could benefit the scheme creditors in the following manner:

(1) they could enjoy the preferential coupon in which the coupon of interest per annum from date of issue payable annually in arrears;

(2) the issuance of RSLS is secured with Retail Lots with market value of RM25,000,000 and the Contra Properties with market value of RM36,098,440; and

(3) this will elevate unsecured to secured obligation against future unsecured obligation, offer a better protection to the scheme creditors in the event of liquidation.

The respondents' objections

[56] The respondents objections are summarised as follows:

(i) the classification of scheme creditors was improper;

(ii) the outcome of the CCM did not fairly represent the view of the scheme creditors and the votes of the BGMCCSB's related companies ought to be disregarded/discounted;

(iii) the scheme is unfair and not bona fide as there was non-disclosure of material facts and/or disclosure of misleading and inaccurate facts contained in the explanatory statement;

(iv) the scheme is unreasonable and reeked of uncertainty and it goes against commercial morality to sanction such a scheme;

(v) BGMCCSB is hopelessly insolvent and it is against public policy to sanction a scheme of a hopelessly insolvent company; and

(vi) the CCM was procedurally flawed as the applicant had failed to communicate its decision on the proof of debts to the respondents and/or provide an opportunity to the respondents to appeal against the decision.

[57] I will now deal with the respondents' above objections in detail below. However, some of these objections overlap and can be dealt with together such as the objection in paras (iii) and (iv).

IMPROPER CLASSIFICATION OF THE SCHEME CREDITORS (RELATED COMPANIES)

[58] The main reason for the challenge on classification of creditors by the respondents was that BGMCCSB's related companies were classified within the same class as follows:

Description	Value (RM)
BGMC International Ltd ('BGMCIL') — being the ultimate holding company of BGMCCSB and owns 100% of BGMCCSB through BGMC Holdings Bhd.	124,987,469.48
Built-Master Engineering Sdn Bhd — being the subsidiary company of BGMCCSB where BGMCCSB holds 80% of its shareholding.	1,386,784.02

Description	Value (RM)
Built-Master Elevator Engineering Sdn Bhd — being the indirect subsidiary company of BGMCCSB where BGMCCSB owns 80% shareholding of the company through Built-Master Engineering Sdn Bhd.	735,420.16
Total	127,109,673.66

[59] The respondents contend that:

(a) there is no community of interest between BGMCCSB's ultimate holding company, BGMCCSB's subsidiary companies and the remaining scheme creditors; and

(b) the remaining of the scheme creditors are only concerned with the repayment of debts whereas the BGMCCSB's ultimate holding company and subsidiary companies have a special interest in seeing the continuing survival of BGMCCSB.

[60] The question here is whether in a scheme of arrangement the related scheme creditors of the company must be placed in a different or separate class from the rest of the scheme creditors.

[61] The principle to be applied in determining the classification of creditors is whether their *rights* against the company, in this case BGMCCSB, are dissimilar (*Re UDL Holdings Ltd & Ors* [2002] 1 HKC 172; *AirAsia X Bhd v BOC Aviation Ltd & Ors* [2021] 10 MLJ 942).

[62] In the Singapore case of *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] SGCA 23, it was held that a related party creditor does not constitute a separate class:

> There is a notable degree of consistency in this line of authority. The principle upon which the classes of creditors or members are to be constituted is that they should *depend upon the similarity or dissimilarity of their rights against the company and the way in which those rights are affected by the scheme,* and *not upon the similarity or dissimilarity of their private interests arising from matters extraneous to such rights*. (Emphasis added.)

[63] A similar position was taken in the case of *AirAsia X* where this issue was comprehensively dealt with in the following passages:

> Test of classification of creditors
>
> [50] The classic test for identifying classes is formulated by Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 ('Sovereign Life') that a class 'must be confined to those persons *whose rights* are not so dissimilar as to make it impossible

for them to consult together with a view to their common interest'. A

[51] This formulation has been subject to further refinements and clarifications in subsequent cases.

[52] In *Re Hawk*, Chadwick LJ at para [33] stated:

> When applying Bowen LJ's test to the question '*are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it to be regarded, on a true analysis, as a number of linked arrangements?*' it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements — so that they should have their own separate meetings — but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so; lest by ordering separate meetings the court gives a veto to a minority group. The safeguard against majority oppression ... is that the court is not bound by the decision of the meeting. It is important Bowen LJ's test should not be applied in such a way that it becomes an instrument of oppression by a minority.

B C D

[53] In *Re Telewest and Argos UDL*, the courts held that *the test is based on similarity or dissimilarity of legal rights against the company and not on similarity or dissimilarity of interest not derived from such legal rights.*

E

[54] Thus, *the fact that individuals may hold divergent views based on their private interest not derived from their legal rights against the company is not a ground for calling a separate meetings*.

[55] The strict distinction between 'legal rights' and 'interest' can sometime be challenging, leading Hildyard J in *Re Apcoa* to make the following comment:

F

> [51] My own sense is that, although the difference (which is plain) between legal rights against the company and personal interests or objectives in the case of particular creditors has always been recognised and emphasised, the importance attached to the difference has somewhat varied over the years. A tendency that developed was to regard Bowen LJ's classis test as to the meaning of the term 'class' as connoting a single ultimate question, that is, whether the class constitution was such that any differences in the rights and the interests of the members of the proposed class were not such as tom prevent them consulting together with a view to their common interests. Post as a single question in that form, the test invites, indeed requires, consideration of interest.

G H

[56] *The established and prevailing approach is to break the question into a two stage test*:

(a) *whether there is any difference between the creditors inter se in their strict legal rights* and

(b) *if there is, to postulate by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous interests or subjective motivations operating in the case of any particular creditors* (see *Re Apcoa* at para [52]).

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A [57] The two stage test was helpfully elaborated and clarified by Lady Wolffe in *Premier Oil Plc and Premier Oil UK Ltd* [2020] CSOH 39 ('Premier Oil Plc') at para [64] as follows:

(1) At the first stage, the court considers the legal rights of the relevant creditors. There are two sets of rights that are relevant in this context (*Re Hawk Insurance Co Ltd* [2001] BCLC 480, at para 30; *Re DDL Holdings Ltd* [2002] 1 HKC 172 at para 17):

B

(i) The existing rights against the company, which are to be released or waived under the scheme; and

C (ii) The new rights (if any) which the scheme gives to those whose rights are to be released or waived.

(2) If there is no material difference between the legal rights of the relevant creditors, they will form a single class. And there is no need to proceed to the second stage of the test.

D

(3) If there are material difference between the legal rights of the relevant creditors, at the second stage the court needs to assess the relevance of those differences.

(4) A class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest in order to avoid the unnecessary proliferation of classes.

E

[68] *It is important to note that at both stages of the test, the Court is concerned purely with the legal rights of the relevant creditors as against the scheme company, not their economic interest* (*UDL*, at para 27, *Re Primacom Holding GmbH* [2013] BCC 201, paras 44-45. (Emphasis added.)

F

[64] In liquidation, BGMCIL and other creditors are all rank in *pari passu* as their debts are all unsecured. The legal rights of BGMCIL against BGMCC is the same with that of other unsecured creditors.

G

[65] In the case of *Wah Yuen*, which concerns related party creditors, the Singapore Court of Appeal held that the fact that the companies are related parties, does not require them be classified in another group:

H

13 Counsel for Wah Yuen correctly submitted that *related party creditors did not constitute a separate class of creditors for voting purposes simply because they were related parties*. This is because 'the test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings': *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin*. (Emphasis added.)

I

[66] The similarity of rights is tested upon the rights of each creditor in the event of liquidation, namely, whether the rights of these creditors are similar in

a liquidation scenario. In this regard in *AirAsia X* it was held as follows:

> [59] Thus, in the case where the appropriate comparator is the insolvent liquidation of the company, *the court will look at what the creditors' legal rights inter se in the case the company is in liquidation and compare that with the relative rights of the creditors inter se under the scheme*. If there is a difference between the creditors' relative positions, the court is to assess whether the difference is such as to render the creditors' rights 'so dissimilar that they cannot sensible consult together with a view to their common interest'. (Emphasis added.)

[67] The alleged BGMCCSB's related companies, BGMCIL, Built-Master Engineering Sdn Bhd ('BME'), Built-Master Elevator Engineering Sdn Bhd ('BMEE') are all unsecured creditors. In the case of liquidation, they are entitled to claim against BGMCCSB and they will rank *pari passu* with each other and the other unsecured creditors. Thus, I agree with learned counsel for the applicant that these companies ought to be classified in one single class with the remaining unsecured creditors.

[68] In *Re Landmark Corp Ltd* [1968] 1 NSWR 759 the Supreme Court of New South Wales held that the seven subsidiary or sub-subsidiary companies ought to be admitted to attend and vote as members of the class of unsecured creditors and decided that the statutory majority was obtained at the meeting.

[69] I have also considered the cases cited by learned counsel for the respondents, namely, *Re Lehman Brothers International (Europe) (in administration)* [2018] EWHC 1980 (Ch) and *In Re Sateras Resources (Malaysia) Bhd* [2005] MLJU 678; [2005] 6 CLJ 194. Both these cases were decided on their individual and distinct set of facts which are different that the present case. In *Re Lehman* Hildyard J held as follows:

> 89. I agree with Counsel for the Administrators that *the mere fact that the majority creditors have a special interest for supporting the scheme does not, without more, entail that the class was not 'fairly represented'.* As appears from Plowman J's formulation of the guiding principles in *Re National Bank Ltd* (see para [65] above), the concern is whether the relevant creditors have a special interest which is adverse to, or clashes with, the interests of the class as a whole. A special interest which merely provides an additional reason for supporting the scheme (without clashing or conflicting with the interests of the class as a whole) does not undermine the representative nature of the vote. This is well established in the authorities both before and after *National Bank Ltd* ... (Emphasis added.)

[70] I am unable to accept learned counsel for the respondents argument that BGMCCSB's ultimate holding company and subsidiary companies have a 'special interest' of ensuring BGMCCSB's continued survival and that is said to be adverse to, or clashes with, the interests of the class as a whole.

[71] The success of the scheme requires BGMCCSB to survive and continue as a going concern and obtain income to satisfy BGMCCSB's debts of its scheme creditors which includes the respondents. Therefore, it would be in the interest of *all* the scheme creditors for BGMCCSB to 'survive'.

[72] This is not something uncommon in many schemes of arrangement. The argument and position taken by the proposer of the scheme of arrangement is usually that the winding up of the company puts it in a worse position than if the scheme was implemented.

[73] In the case of *Re Sateras* cited by learned counsel for the respondents, there are several obvious differences as compared to the instant case, inter alia, as follows:

(a) the amount owing by the subsidiaries of the scheme company was more than 50% of the total scheme debts. However, here the amount owed by BGMCCSB to its subsidiaries (BME and BMEE) is only around *0.8%* of the total scheme debts. The majority of the scheme creditors are not subsidiaries or related party companies of BGMCCSB and they could have by majority caused the Scheme to fail if they voted against the Scheme but they did not; and

(b) BGMCIL is not the subsidiary companies of BGMCCSB and BGMCCSB is not in could of BGMCIL. No evidence of this alleged control was preferred by the respondent.

[74] It is unavoidable in some cases that the company undergoing restructuring under s 366 of the CA 2016 would have related party creditors but this does not necessarily mean that those creditors should be treated differently or classed separately when their rights against the company are the same as the other non-related party creditors.

[75] The Federal Court in *Francis a/l Augustine Pereira v Dataran Mantin Sdn Bhd* [2014] 6 MLJ 56 reaffirmed the test formulated by Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 and held as follows:

> [65] With regard to the question of law posed in Legendas appeals, our answer is as follows:
>
> *All creditors of a company whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.*
>
> In other words, we agree with the test formulated by Bowen LJ in *Sovereign Life Assurance Co v Dodd*, which is still a good law. (Emphasis added.)

[76] In the circumstances, the classification of the scheme creditor was proper as the scheme creditors were classified based on their 'rights against BGMCCSB', not their 'interest'.

VOTES OF THE RELATED COMPANIES OUGHT TO BE DISCOUNTED/DISREGARDED

[77] The issue here considerably overlaps somewhat with the earlier issue regarding the improper classification of the scheme creditors.

[78] It was submitted by learned counsel for the respondents that *alternatively*, in the event that this court finds that the class of scheme creditors was properly classified, the class of creditors was not fairly represented in the CCM.

[79] Since I have determined that the classification of the scheme creditors was proper, it does not stand to reason why the votes of the scheme creditors related to BGMCCSB ought to be discounted or disregarded.

[80] Firstly, s 366(3) of the CA 2016 confers the right of the scheme creditors under a scheme of arrangement to vote.

[81] Secondly, there is nothing in CA 2016 that empowers the court to discount or disregard the scheme creditors' votes.

[82] In fact, in order to determine if the 75% threshold requirement is met under s 366(3) of the CA 2016, the scheme creditors must be allowed to vote on the scheme. This is one of the statutory requirements (*Re National Bank Ltd* [1966] 1 All ER 1006; *Re Telewest*, *AirAsia X* and *Re Lehman*).

[83] What the court is empowered to do based on the trite principles stated in, inter alia, cases such as *Re Telewest* and *Transmile* is to not approve the scheme where it has failed the bona fide and the reasonableness tests.

[84] To my mind and with all due respect to both learned counsel for the respondents and the applicant, it is essentially a play of words between them. What it all boils down to and the net effect is that the court would not approve the scheme of arrangement if the court finds, based on the bona fide and the reasonableness tests, that:

(a) the class was *not* fairly represented by those who attended the meeting and that the statutory majority are *not* acting bona fide and are *coercing* the minority in order to promote interests *adverse* to those of the class whom they purport to represent; and

(b) the scheme of arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably *not* approve.

[85] Despite the respondents allegations that the bona fide test was not satisfied, they have not shown any evidence that the class was not fairly represented or that the majority was not acting bona fide or that the minority was being coerced to promote interests adverse to those of the class whom they purport to represent. The respondents allegations are again similar to the issues on the improper classification of creditors and are essentially that:

(a) there are substantial related party scheme creditors of BGMCCSB which includes Kas Engineering Sdn Bhd, Modular Construction Technology Sdn Bhd, Bras Venture Berhad, B&G Global Property Sdn Bhd, Correct Lifestyle Sdn Bhd which the respondents claim are connected to BGMCCSB through direct or indirect interests such as shareholders or directors;

(b) the related party scheme creditors have special interests in the scheme in that they have a special interest to see BGMCCSB's continues as a going concern which is not in line with the interest of the other scheme creditors; and

(c) that these related party scheme creditors casted their votes in favour of the scheme. This goes to the argument of the voting pattern of the scheme creditors.

[86] I have considered the applicant's response to the respondents' above allegations and I agree with the following submissions by learned counsel for the applicant on this issue:

(a) even in the best case for the respondents, there are still *67%* (or approximately 2/3 of total value of the scheme creditors) who are in support of the scheme (after removing the votes of all the related companies);

(b) referring to the List of Votes For the Scheme ('respondents' list') as exhibited in respondents in their respective affidavits in reply at pp 104–111 of encls 45 to 48, the votes of the alleged related companies (in particularly in respect of Modular Construction Technology Sdn Bhd ('Modular') as there is no commonality of shareholders), it is evident from the respondents' list that Bras Ventures, B&G Property and Correct Lifestyle have *not* voted in the CCM. It is therefore illogical to deduct their value from the total votes when they have not casted any. For clarity the respondents' list is reproduced below:

Related Companies	Value (RM)	Votes during CCCM
BGMCIL	124,987,469.48	124,987,469
BME	1,386,784.02	1,386,784
BMEE	735,420.16	735,420
KAS	2,615,712.36	2,615,712
Modular Construction Technology Sdn Bhd	11,500,000.00	11,500,000
Bras Ventures Bhd	682,929.40	N/A
B&G Global Property Sdn Bhd	32,954.35	N/A
Correct Lifestyle Sdn Bhd	1,009,617.18	N/A
	Total:	141,225,385

(c) applying the manner of calculation of the respondents as stated in para 30 of the respondent's written submissions in encl 83, the total votes in favour of the scheme *excluding* the alleged related companies' votes would then be as follows:

$$\frac{\textit{Total vote in favour of the Scheme} - \textit{Votes of BGMCIL,BMEE,BME KAS ,Modular Construction}}{\textit{Total votes} - \textit{Votes of BGMCIL,BMEE,BME,KAS,Modular Construction}} \times 100\%$$

$$= \frac{195,423,386 - 124,987,469 - 735,430 - 1,386,784 - 2,615,712 - 11,500,000}{221,366,910 - 124,987,469 - 735,430 - 1,386,784 - 2,615,712 - 11,500,000} \times 100\%$$

$$= \frac{54,197,991}{80,141,515} \times 100\%$$

$$= \underline{67.62\%}$$

(d) hence, even in the worst-case scenario for the applicant (where substantial supporting scheme creditors' view are disregarded), there is more than *2/3* of all the scheme creditors who was in favour of the scheme. This is an important consideration, as the support to the scheme is not due to any oppression or undue influence by majority.

[87] Learned counsel for the respondents further submitted in the alternative that the court should discounting the votes of the related party scheme creditors of BGMCCSB in accordance with their ascertained interest and the case of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] SGCA

9; [2012] 2 SLR 213 was cited.

[88] However, the basis of the decision of *The Royal Bank of Scotland* is that there was *no* evidence to *rebut the presumption* that the 'wholly owned subsidiaries' were in entire control of the scheme company. The court was entitled, therefore to treat the subsidiaries votes as if they are the scheme company, and not reflective of the general view of creditors. The situation is different in the present case and the decision in *The Royal Bank of Scotland* is not applicable as pointed out by learned counsel for the applicant based on the following reasons which I agree:

(a) for BGMCIL, it is the ultimate holding company listed in Hong Kong. There cannot be any presumption that the scheme company has influenced the decision of BGMCIL. The decision to support the scheme was unanimously made by the Board of BGMCIL, the majority of which by *independent directors*. There is no evidence to suggest that they are either involved in controlling BGMCCSB or are being controlled by BGMCCSB or its directors. This is mere speculation by the respondents without material evidence;

(b) for other partially owned subsidiaries, namely BME and BMEE, the shareholding of BGMCCSB in these subsidiaries was 80%. The decision to vote in favour of the Scheme was made by the unanimous decision of the board of BME and BMEE while there are *other directors* within the boards of BME and BMEE, who are not personally related to BGMCIL, the applicant and/or BGMCCSB;

(c) for the other alleged 'related party' as mentioned by learned counsel for the respondents, namely KAS, Modular, Bras Venture Bhd, B&G Global Property Sdn Bhd and Correct Lifestyle Sdn Bhd, there is no evidence to suggest that BGMCCSB could have control over the affairs of these companies and vice versa;

(d) just because there is some connection between these companies and BGMCCSB does not mean and should not be taken to mean that BGMCCSB has control over them. It would be manifestly unfair to make such a presumption by using the slightest connection between these companies and BGMCCSB;

(e) further, the indirect interest of BGMCIL in BGMCCSB (through its interests in BGMC Malaysia Ltd and the applicant), as the registered shareholder of BGMCCSB) is RM10m;

(f) thus, even if *The Royal Bank of Scotland*'s decision is applied, only RM10m is to be discounted. *After* the discount, there is still *83.7%* approval as can be seen from the following calculation:

$$\frac{\textit{Total votes in favaour the Scheme} - \textit{BGMCIL's shareholding in BGMCCSB}}{\textit{Total votes}} \times 100\%$$

$$\frac{195{,}423{,}386 - 10{,}000{,}000}{221{,}366{,}910} \times 100\%$$

$$\frac{185{,}423{,}386}{221{,}366{,}910} \times 100\%$$

= **83.76% (in favour of the Scheme)**

(g) accordingly, BGMCIL's interest as creditors of BGMCCSB (with debts totalling of RM124,987,469.48) far outweighs its interest as shareholder of BGMCCSB (RM10m held through BGMC Malaysia Ltd and the applicant); and

(h) however, as stated earlier there is no justification on the facts for any discount of votes to be exercised. There is no basis to discount the debt of the ultimate holding company.

[89] The respondents' suggestion that all related company creditors' votes are to be discounted irrespective of the terms of the scheme and relationship between the creditors and scheme company is unreasonable and is not in line with the principles stated in *Re Lehman*, *Re Century Sun International* [2021] HKCU 4788 and *Re: App (Hong Kong) Ltd* [2004] HKCU 477.

[90] In *Re Century*, the High Court Hong Kong Court of First Instance held:

> *Did the approval of Scheme fairly reflect the interests of Scheme Creditors?*
>
> [22] The majority of the debt compromised by the Scheme is inter-company debt. Scheme Creditors, who are also subsidiaries of, or associated with the Company, account for around 67% of the debt to be compromised by the Scheme. The Opposing Creditors argue that it can be inferred that the Group creditors are motivated by additional reasons such as advancing the wider business plan of the Group. It may well be that the boards of the Group creditors see other advantages to the Scheme being implemented other than a better return than that which is likely to be achieved if the Company is put into liquidation. However, that is not the test. The test is whether because of their additional interests their views cannot be regarded as fairly representative of the class. The Opposing Creditors identify reasons why the Group creditors may have an additional interest in the Scheme being implemented, but they do not point to any reasons for concluding that their decision to support the Scheme as an alternative to liquidation is not fairly representative of the views of unsecured Scheme Creditors generally. *It cannot be the case that simply because there are reasons why a creditor may perceive advantages in supporting a scheme, which are irrelevant to other creditors, that their opinion should be*

> *viewed as likely to be atypical of the class and thus should be discounted. What is necessary, absent direct evidence of a creditor's motives for supporting a scheme, is for matters to be identified from which it can reasonably be inferred that a creditor in voting for the scheme was not primarily motivated by an assessment of whether or not the benefits of the scheme were more attractive than the likely outcome if the company were to go into liquidation*. I agree with Mr Ho Hnat the focus is on why the creditor supports a scheme rather than why a creditor might not. For this reason one way of testing whether or not there is reason to think that the creditor was unrepresentative of the class, is to ask *whether there is anything that suggests if the creditor, whose motive is impugned had not had the 'special interest' in question, he would have voted differently*. *The Opposing Creditors have not pointed to anything, which suggests that Group creditors would have voted differently but for their relationship with the Company*. This is in contrast with the Opposing Creditors apparently voting against because they thought that they would lose their rights against CS Mauritius, although in fact it has subsequently been clarified that they will retain that right under a new agreement that has been signed. I, therefore, do not consider that the Group creditors' vote, or any part of it, should be discounted. (Emphasis added.)

[91] Further, in *Re: App* the High Court Hong Kong Court of First Instance held:

> 37. As stated earlier, for present purpose, the Company is required to establish reasonable prospects of a viable scheme with sufficient in-principle support. *I am unable to draw a compelling inference that in giving their support the related parties must have been motivated by interests other than those to which an intelligent and honest man, acting in the interests of the class as a whole, might have regard, so that the votes of the related parties would inevitably be discounted at the sanction hearing*. It seems to me that the matters put forward by the Company do merit serious consideration and there is something to be said for the commerciality of the proposed scheme. I am inclined to agree with Mr Manzoni that it is reasonably arguable that the votes of the related parties may not necessarily be discounted at the sanction stage, so that the Company has shown reasonable prospects of a viable scheme with sufficient in-principle support. (Emphasis added.)

[92] In the present case, there is special feature which is not found in any of the cases referred by the learned counsel for the respondents and this condition is that BGMCIL will subordinate its claims against BGMCCSB to the rest of creditors. It shows that the votes of BGMCIL had been casted with 'class promoting view'. BGMCIL does not enjoy any additional benefit from the Scheme, but rather subordinated its interest to the benefit of other creditors. The indirect shareholding interest of BGMCIL in BGMCCSB does not override the 'class promoting view' in the scheme.

[93] Learned counsel for the respondents submitted that the respondents wanted their debts being paid. The scheme voted by the majority does exactly the same. The scheme provides the scheme creditors better deals as compared with the liquidation scenario, particularly, the single biggest unsecured

creditor, BGMCIL will not be ranked in *pari passu* under the condition of the Scheme. A

[94] BGMCIL can be motivated by ensuring that BGMCC continues as a going concern, but this is not an interest that clashes with the interests of the scheme creditors as a whole. As I had stated earlier, the scheme and the interests of the general creditors depend on BGMCCSB continuing its trades. B

[95] There is nothing wrong for any creditor to be interested in ensuring that the scheme company continues as a going concern. In fact, the paramount objective of s 366 of the CA 2016 is to ensure the scheme company continues as a going concern (AirAsia X). C

[96] Learned counsel for the applicant has also aptly provided various scenarios where the votes of the related party scheme creditors votes were discounted based on the respondents arguments. These scenarios show a *voting pattern* which ultimately favours the scheme and this can be seen in the following calculations: D

(1) Scenario A (with BGMCIL, BMEE, BME and KAS's votes fully discounted) E

$$\frac{Total\ votes\ in\ favour\ the\ Scheme - BGMCIL - BMEE - BME - KAS}{Total\ votes - BGMCIL - BMEE - BME - KAS}\ x\ 100\%$$

F

$$= \frac{195{,}423{,}386 - 124{,}987{,}469 - 735{,}420 - 1{,}386{,}784 - 2{,}615{,}712}{221{,}366{,}910 - 124{,}987{,}469 - 735{,}420 - 1{,}386{,}784 - 2{,}615{,}712} \times 100\%$$

=71.69% in favour of the Scheme

G

(2) Scenario B (With BGMCIL's votes discounted to the extent of its share value & with BGMCCSB's subsidiaries - BMEE, BME and the related company - KAS's votes fully discounted):

H

$$\frac{Total\ votes\ in\ favour\ the\ Scheme - BGMCIL's\ shareholding\ in\ BGMCCSB - BMEE - BME - KAS}{Total\ votes - BGMCIL's\ shareholding\ in\ BGMCCSB - BMEE - BME - KAS}\ x\ 100\%$$

I

$$= \frac{195{,}423{,}386 - 10{,}000{,}000 - 735{,}420 - 1{,}386{,}784 - 2{,}615{,}712}{221{,}366{,}910 - 10{,}000{,}000 - 735{,}420 - 1{,}386{,}784 - 2{,}615{,}712} \times 100\%$$

=87.44% in favour of the Scheme

(3) Scenario C (With BGMCIL's votes discounted to the extent of its share value and with BGMCCSB's subsidiaries - BMEE, BME's votes fully discounted):

$$\frac{Total\ votes\ in\ favour\ the\ Scheme - BGMCIL's\ shareholding\ in\ BGMCCSB - BMEE - BME}{Total\ votes - BGMCIL's\ shareholding\ in\ BGMCCSB - BMEE - BME} \ x\ 100\%$$

$$= \frac{195{,}423{,}386 - 10{,}000{,}000 - 735{,}420 - 1{,}386{,}784}{221{,}366{,}910 - 10{,}000{,}000 - 735{,}420 - 1{,}386{,}784} \times 100\%$$

= 87.60% in favour of the Scheme

(4) Scenario D (With BGMCCSB's subsidiaries – BME, BMEE and the related company – KAS's votes fully discounted):

$$\frac{Total\ votes\ in\ favour\ the\ Scheme - BMEE - BME - KAS}{Total\ votes - BMEE - BME - KAS} \ x\ 100\%$$

$$= \frac{195{,}423{,}386 - 735{,}420 - 1{,}386{,}784 - 2{,}615{,}712}{221{,}366{,}910 - 735{,}420 - 1{,}386{,}784 - 2{,}615{,}712} \times 100\%$$

=88.02% in favour of the Scheme

(5) Scenario E (With BGMCCSB's subsidiaries – BME, BMEE's votes fully discounted)

$$\frac{Total\ votes\ in\ favour\ the\ Scheme - BMEE - BME}{Total\ votes - BMEE - BME} \ x\ 100\%$$

$$= \frac{195{,}423{,}386 - 735{,}420 - 1{,}386{,}784}{221{,}366{,}910 - 735{,}420 - 1{,}386{,}784} \times 100\%$$

=88.17% in favour of the Scheme

THE SCHEME IS UNFAIR AND LACKED BONA FIDE

[97] The respondents alleged that the scheme was not fair and lacked bona fide as the explanatory statement provided to the scheme creditors contained misleading information and/or failed to provide material information critical to make a conclusion on the scheme.

[98] The misleading information and/or lack of information complained by the respondents are summarised as follows:

Shah Alam High Court Suit:

(a) the Shah Alam High Court Suit of RM25,251,526.22 against BGMCCSB ('the SAHC Suit') that was subsequently struck out but the fact that it was struck out was not stated in the explanatory statement;

(b) it was also not stated that there was a co-defendant together with BGMCCSB, that is Kingsley Hill Sdn Bhd in the SAHC Suit;

(c) the striking out of the SAHC Suit was subsequently announcement by BGMCIL on *11 December 2020*; and

(d) the information regarding the SAHC Suit is said to be misleading and purports to support the scheme.

The retail lots:

(e) the unsatisfied open charge by OCBC Al-Amin Bank Bhd ('OCBC Al-Amin') over 43 parcels of retail lots known as V Residensi 2 @ Shah Alam ('retail lots') vide a deed of assignment as of 4 August 2021 was allegedly not disclosed in the explanatory statement; and

(f) the market value of the retails lots as quoted by the applicant of RM25m in its estimated recovery value ('ERV') and the estimated value as per the applicant's statement of affairs of RM20m are contradictory to each other.

Contra Properties:

(g) there are discrepancies as to the value of the Contra Properties.

(h) in the explanatory statement for the security of the RSLS, the applicant claimed that market value of the Contra Properties is RM36,098,440. However, the Contra Properties had also been valued as having the net book value ('NBV') of only RM25,504,580 and ERV of only RM19,128,435 concurrently.

[99] The applicant has successfully and clearly responded to the above allegations by the respondents of misleading information and/or lack of information.

[100] I accept the applicant's said response which I summarise below.

Shah Alam High Court Suit

[101] The explanatory statement has disclosed the material litigation involving BGMCCSB and the fact that BGMCCSB is the defendant in the

SAHC Suit. Kingsley Hill Sdn Bhd being the co-defendant in the SAHC Suit has nothing to do with BGMCCSB and/or the scheme. The material fact here is the existence of material litigation and that has been sufficiently disclosed.

[102] As at 15 May 2021, the SAHC Suit was still not completely resolved as despite the striking out, some of the plaintiffs had lodged appeals against the striking out decision. The hearing of the appeals was fixed on *25 August 2021* which is *after* date of the explanatory statement of 25 May 2021. Hence, there is no issue of misleading information in this case and it is proper to include the SAHC Suit as one of the material litigations in the explanatory statement.

[103] I would further add the fact that the SAHC Suit was struck out was announced by BGMCIL vide its announcement dated *11 December 2020* in The Stock Exchange of Hong Kong Ltd. This was acknowledged by the respondents.

[104] Therefore, this information was publicly available about *five months* prior to the CCM and the respondents cannot feign ignorance of this fact.

[105] In addition to this the respondents *never* raised this issue regarding the SAHC Suit at the CCM or the several meetings held prior to that by BGMCCSB.

The retail lots

[106] The applicant had in its affidavits in reply (encls 45–48) confirmed that BGMCCSB will proceed to discharge the retail lots for the purpose of the RSLS once it obtains the order of the court for sanction of the Scheme. It is important for me to highlight at this juncture that the discharge of the retails lots was an addition condition which I had included in the sanction order as part of the sanction granted by this court.

[107] The existence of the charge on the retail lots would only materially affect the performance of the scheme if and only if there is inability on the part of BGMCCSB to discharge. However, as shown in BGMCCSB's Announcement to dispose of KAS, part of the disposal of KAS will be used to pay the bank facilities.

[108] Be that as it may, the issue here is again, as in the case of the information regarding the SAHC Suit, that the information regarding the charge on the retail lots was made publicly available well before the CCM.

[109] Further, the information regarding the retail lots and the charge over them can be reasonably obtained from the statement of affairs.

[110] Therefore, the respondents really have no reason to complain.

[111] As for the allegation that there are discrepancies and a contradiction in the market value of the retail lots in the statement of affairs and the ERV, the respondents' allegation is misconceived and have failed to appreciate the following:

(a) the difference between the *market value* and the *ERV* was an advice pursuant to the *scheme advisor*, premised on several market forces, as explained in the applicant's reply affidavits (paras 8.2.2 of encls 45–48), such as impact of the pandemic to the property market, maintenance charges to be incurred, quit rent, assessment and so on; and

(b) it is called 'estimated' realisable value, which means that the value is merely an estimation and *not* definitive. The scheme creditors were *not* misled by this reference. It is a matter of *opinion*. Hence, there is no basis to say that there is misrepresentation of the fact. The scheme creditors having been informed that the value was mere estimation, is entitled to form their own opinions.

[112] The valuation report confirmed that the market value of the retail lots was RM25m. Although the valuation was conducted in *September 2020*, it was less than a year from the CCM on 16 June 2021. Thus, there is no necessity to have another report or valuation to be conducted. In any event the respondents did not show evidence that the value of the property has substantially altered. Their contentions were merely based on their personal opinion which is not substantiated by any independent or professional report.

[113] I must put emphasis on the fact that the explanatory statement regarding the scheme can contain certain opinions and estimates which are usually given by independent professional financial advisers such as the scheme adviser. It is up to the scheme creditors to assess for themselves whether to accept or reject these opinions.

[114] The reasonable creditor being part of a scheme of arrangement ought to independently assess the scheme. In this regard they should also avail themselves of information which is in the public domain.

[115] At the court convened creditor's meeting the scheme creditors are entitled to ask questions and query every aspect of the scheme. Failure to do so could affect any complain the scheme creditor may have at the sanction stage.

[116] Again, in the present case as in the case of the SAHC Suit, the respondents *never* raised the above issues regarding the retail lots at the CCM or at several meetings held prior to that. These matters were raised *after* the event and can be construed as an afterthought. It also goes to the bona fides of the respondents' complaints themselves.

Contra Properties

[117] The Contra Properties have a listed price totalling RM36,098,440. Upon negotiations and agreements between BGMCCSB and its debtors, and after factoring the marketability of these Contra Properties, the contra value arrived at was RM25,504,580.

[118] Thus, this amount was then recorded as the NBV of the Contra Properties for settlement of outstanding sums, RM25,504,580.

[119] The ERV of RM19,128,435 was based on the net realisable value and the forced sale value in the event of liquidation of BGMCCSB and the basis of the estimation was pursuant to the advice from the scheme adviser, in which the applicant and BGMCCSB have taken into account of the impact of the pandemic of COVID-19 to the property market as well as the other factors such as maintenance charges for upkeeping of the properties, quit rent, assessment and so on.

[120] All the above three different assigned values were disclosed and shown in:

(a) the statement of affairs; and

(b) the explanatory statement.

[121] The respondents have no factual or evidential basis to dispute the market value or the NBV or ERV of the Contra Properties which was the listed price, amount received from BGMCCSB's debtors for settlement of outstanding sums as well as the estimation pursuant to the advice of the scheme advisor of BGMCCSB and premised on several market forces.

[122] Similar to the case of the SAHC Suit and the retail lots, the issues raised by the respondents regarding the Contra Properties were not raised at the at the CCM or the meetings held before the CCM where BGMCCSB had given the scheme creditors an opportunity to engage with it before the CCM.

[123] This, to my mind, is fair and it would give the proposer of the scheme to take into consideration any issues raised by the scheme creditors as early as

possible and address them accordingly. In the present case, the scheme was improved after taking into account certain issues raised by the scheme creditors.

[124] That is one of the reasons I am unable to accept the respondents complaints on misleading information or the lack of information. The respondents had every opportunity to raise these matters with BGMCCSB *before* or *at* the CCM but they chose not to do so. At the very minimum if these matters were raised at the CCM then the other scheme creditors could also be involved in any discussion that ensued. It does not augur well for the respondents to only now raise a myriad of issues when they could have done so before and at the CCM.

[125] On the issue of the materiality of the information regarding the Scheme and what should or should not be disclosed as well as the extent of the information to be disclosed, this will depend largely on the type of information and is based on the facts of each particular case. The issue is also whether the information is fundamental.

[126] On this issue of disclosure of information in respect of a scheme of arrangement, in *Re UDL Holdings Ltd & Ors* [2006] HKCU 917 it was held as follows:

> *If the explanatory statement had given all information reasonably necessary*
>
> [39] I will also start with the legal principles, which are not in dispute. For the court to sanction the Modifications, *it must be satisfied that the Scheme Modification Document sent to the scheme creditors was 'perfectly fair and as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote'* (*Re Dorman, Long & Co Ltd* [1934] 1 Ch 635 at 657). *What sort of information is reasonably necessary and the extent of the information that should be supplied would depend on the facts of the particular case*. Thus, in *Re Kansa Genera/ International Insurance Co Ltd (in compulsory liquidation)* [1999] 1 HKC 254, the court held that whilst there were considerable deficiencies in the financial information provided, the deficiencies were not so fundamental as to negative the consent of the scheme creditors and so did not withhold sanction to the scheme. In *Re Heron International NV* [1994] 1 BCLC 667, although the information provided to creditors could be fairly criticized on one or two points, when further information was produced in evidence, the court did not think such information would have caused any consenting creditor to change his mind and the scheme was sanctioned.
>
> ...
>
> [46] I think *the essence of the complaint is inadequacy of information rather than a total lack of it, as some pertinent information has been provided, by and large, in the Scheme Modification Document. Further information has been provided by the scheme administrator in his affidavits filed in these proceedings. Whether the extent of the information provided is sufficient in all the circumstances is a matter of fact and degree.*

> *The information in the Scheme Modification Document should be considered in the light of what was already known to the scheme creditors as to the progress of the administration of the Schemes and the difficulties encountered*. The scheme administrator had held 14 formal meetings with the committee of inspection since the Schemes became effective in April 2000. In addition, he had from time corresponded with members of the committee on the progress and issues relating to the Schemes. At a meeting of the committee of inspection on 11 July 2005 which was prior to the court meeting, the scheme administrator provided a summary of all the work done from 2000 to 2005, and a copy of this was produced in evidence. *I am not prepared to refuse sanction on this ground, as I am not persuaded that further information along the lines as indicated by Fonfair would have a material effect on the voting or caused any consenting scheme creditor to change his mind*. (Emphasis added.)

[127] In *Re Kansa General International Insurance Co Ltd (in compulsory liquidation)* [1999] 1 HKC 254 it was held as follows:

> In my judgment, *whilst there are considerable deficiencies in the financial information, they are not so fundamental as to negative the consent of the scheme creditors*. The acceleration of receipts is plainly an important if not the decisive factor from the perspective of any Scheme Creditor. So whilst I do not consider that the court's sanction should be withheld, this should be fair warning to petitioners that full and accurate information as to the financial impact of any scheme is required and failure to provide such information may result in costs being disallowed. (Emphasis added.)

[128] The following can be summarised from the above authorities of *Re UDL Holdings* and *Re Kansa General* in so far as it applies to the instant case:

(a) not all information needs to be disclosed;

(b) whether the extent of the information provided is sufficient in all the circumstances is a matter of fact and degree (*Re UDL Holdings*);

(c) the court takes into account whether the information is so fundamental as to negative the consent of the scheme creditors (*Re Kansa General*);

(d) the information in the scheme documents or explanatory statement should be considered in light of what the scheme creditors already know. This would include information which are in the public domain or is otherwise publicly available (*Re UDL Holdings*);

(e) the information or materials can be made available through, inter alia, the statement of affairs (*Re UDL Holdings*); and

(f) the court will focus on the general purpose of the explanatory statements and decide if the alleged shortcoming of the information would have material effect on the decision of the scheme creditors.

[129] Having considered the complaints by the respondents on this issue in detail I find that apart from what I have stated above, the complaints are really not because the information is misleading or insufficient. Rather, it would appear to me that the respondents criticism of the scheme is something that came about after the CCM and is centred on challenging the scheme by searching for weaknesses in it after it was approved by a majority of the scheme creditors.

[130] I find no merits in the respondent's complain on this issue that the scheme is unfair and lacked bona fide.

THE SCHEME IS UNREASONABLE

[131] I have earlier dealt with at length the merits of the scheme itself in particular regarding the purpose and rationale of the scheme. In this regard I have also set out in detail the background of the scheme.

[132] I accept the applicant's reasons and purpose of the scheme as stated in para 55 above. I do not find the scheme to be unreasonable.

[133] The court's role at the sanction stage has summarised earlier in para 53 above and it is not necessary for me to repeat it save to say that the court, in exercising its supervisory role, will leave it generally to the scheme creditors to make their own decision using their commercial judgment (*Re Axa*; *Re BRL Hardy*; *Re Sonodyne*; *Sentoria*).

[134] I am aware and cautious of the fact that the court should not embark on a detailed analysis of the merits of the scheme as against another (*Transmile*) and substitute the commercial judgment of the scheme creditors with the court's.

[135] In *Re Apcoa Parking Holdings GmbH* [2016] 1 All ER (Comm) 30 the court held as follows:

> SANCTION HEARING
>
> [126] *The principles the court must apply when considering whether to sanction a scheme of arrangement are well established*. The most regularly cited passage (see, for example, Lloyd J in *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch); [2002] 2 BCLC 510 (at [29]) and Re Telewest Communications plc (No 2); *Re Telewest Finance (Jersey) Ltd (No 2)* [2004] EWHC 1466 (Ch); [2005] 1 BCLC 772 (at [20])) is derived from a passage in Buckley on the Companies Acts, approved by Plowman J in *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012; [1966] 1 WLR 819 at 829: ...
>
> ...

A [128] *The court's role is not to substitute its own assessment of what is reasonable for that of the creditors. They are much better judges of what is in the commercial interests of the class they represent than the court*. This approach is clear from amongst others the following authorities:

B (1) *Re Alabama New Orleans Texas and Pacific Junction Rly Co* [1891] 1 Ch 213 at 247 per Fry LJ:

Under what circumstances is the Court to sanction a resolution which has been passed approving of a compromise or arrangement? *I shall not attempt to define what elements may enter into the consideration of the Court beyond this, that I do not doubt for a moment that the Court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it*.

C

D ...

[129] These authorities make clear that *the court must give full weight to the decision of the creditors*, acting in their capacity as members of the class in which they are voting. *It is not sufficient for the court to determine that it would not have reached the same decision as the creditors themselves reached*. In the absence of some procedural or jurisdictional hurdle (or of some blot on the face of the scheme itself), the court should only decline to sanction the scheme if an intelligent and honest member of the relevant class acting in respect of his interest could not reasonably have approved it. (Emphasis added.)

E

F **[136]** Based on the authorities such as *Re Apcoa*, I see no reason not to give effect to the decision of the majority of the scheme creditors that has met and exceeded the statutory 75% threshold requirement.

G BGMCCSB IS HOPELESSLY INSOLVENT

[137] It is not in dispute that BGMCCSB is facing financial difficulty and currently suffering from cash flow issue. That is why the scheme and indeed many schemes of arrangement are proposed, ie due to some financial

H difficulties which the companies may face.

[138] In this regard, with respect, learned counsel for the respondents reliance on *AirAsia X* to say that BGMCCSB is hopelessly insolvent in the context of the present case is misplaced.

I

[139] In contrast with *AirAsia X*, here BGMCCSB is not seeking for assistance from any white knight or fresh injection of capital. The repayment to the scheme creditors under the scheme is from the self-generated income, with substantial amount backed by fixed assets (inclusive of RM25m of the retail

lots and RM36,098,440 of the Contra Properties, totalling RM61,098,440). Another RM40m is from KAS's disposal which has been completed and the proceeds earmarked. Thus, about 70% of the funds needed for the implementation of the Scheme is guaranteed.

[140] Learned counsel for the applicant also pointed out that BGMCCSB is still in active trading and is currently engaged in three major projects, namely T035-Spice Hotel, T306-Seputeh, and T042-Bangsar, which would contribute revenue to BGMCCSB upon completion of these projects.

[141] The respondents' allegation that BGMCCSB is hopelessly insolvent is based on its simple analysis and deduction of BGMCCSB's financial position by comparing BGMCCSB's projected cashflow against the scheme debt. The respondents' allegation is not supported by, for example, a counter report or analysis by a financial expert or professional.

[142] Learned counsel for the applicant submitted that:

(a) it is the respondents' averment that the projected cashflow of RM107,303,401.13 is insufficient to meet the scheme debts of RM144,735,840.60. However, with the subordination of the claims by BGMCIL, the remaining scheme creditors are not at the risk of recovering their debts under the scheme despite such shortfall. The projected cashflow is approximately 30% more that the scheme debts payable to the remaining creditors; and

(b) further, considering the revenue to be generated by BGMCCSB from its major projects above, the liquidity of BGMCCSB will improve post the implementation of the scheme and thus enable BGMCCSB to continue trading and to secure more construction works and projects in the future. Hence, there is lack of factual basis for the respondents to argue that BGMCCSB is hopelessly insolvent post implementation of the Scheme.

[143] Therefore, I am not persuaded by learned counsel for the respondents' argument that BGMCCSB is hopelessly insolvent.

[144] The first and third respondents also averred that their claims were not being recognised by BGMCCSB and it amounts to breach of natural justice by the applicant. However, they have failed to furnish sufficient documents in support of their proof of debt, even after being challenged by the applicant at this sanction stage.

[145] In any event, I agree with the learned counsel for the applicant that the differences in the amount claimed by the first and third respondents and

amount recognised under the Scheme is not a ground to dismiss this originating summons. The alleged overclaim sum has no bearing on and would not affect the scheme.

CONCLUSION

[146] I find that the statutory 75% threshold requirement has been met and that the bona fide and reasonableness tests have both been satisfied.

[147] In the circumstances, I allowed the originating summons with no order as to costs.

Originating summons allowed with no order as to costs.

Reported by Dzulqarnain Ab Fatar